

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CLIFFORD L. KIRKPATRICK**  
Claimant

VS.

**TWA**

Respondent

AND

**TRAVELERS INDEMNITY**

Insurance Carrier

AND

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 189,949

**ORDER**

Respondent appeals from an Award entered by Administrative Law Judge John D. Clark on September 26, 1995. The Appeals Board heard oral arguments February 6, 1996.

**APPEARANCES**

The claimant appeared by his attorney James B. Zongker of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney William L. Townsley III of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Edward D. Heath, Jr. of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed the record listed in the Award. The Appeals Board adopts the stipulations listed in the Award.

**ISSUES**

The sole issue to be considered on appeal is the nature and extent of claimant's disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon review of the record and after considering the arguments made by the parties, the Appeals Board finds that claimant should be entitled to benefits based upon 16 percent permanent partial impairment of function through January 1, 1995 and a 35.5 percent work disability thereafter.

Claimant, age 53, injured his low back on April 2, 1993 while working as a crew chief of the ramp service operations at respondent's Wichita location. The injury occurred when the claimant slipped and fell down a set of stairs while unloading an ice container. Claimant was immediately referred to Dr. Robert Eyster. Dr. Eyster obtained an MRI examination and diagnosed disc herniation. After a period of conservative treatment, on July 14, 1993 Dr. Eyster performed a laminectomy at L4-5 with foraminotomy and laminectomy and decompression at L5-S1.

Claimant did well for approximately three weeks after surgery and then experienced aggravation with pain down his legs. Because it was thought the aggravation might be due to physical therapy, Dr. Eyster terminated the therapy and placed the claimant on prednisone. Another MRI indicated there had not been a recurrent disc herniation and conservative treatment was continued. Claimant underwent work hardening which concluded in February of 1994, and Dr. Eyster released claimant to return to work on February 18, 1994.

At the time Dr. Eyster released claimant to return to work in February of 1994, he restricted claimant to lifting 75 pounds, no repetitive lifting over 45 pounds, no repetitive bending or twisting over 20 times per hour and no squatting more than 20 times per hour. Dr. Eyster opined that claimant had a 12 percent permanent partial impairment of function to the body as a whole.

In May of 1994, claimant contacted Dr. Eyster and requested that the work restrictions be lifted because he, the claimant, thought the restrictions might cause him to lose his job. Claimant also advised Dr. Eyster that he thought he could handle the job duties and that he would perform them carefully. Dr. Eyster advised him that the restrictions were legitimate and remained what he, Dr. Eyster, indicated. Because Dr. Eyster understood this to be more of a "paper problem," Dr. Eyster, nevertheless, lifted the restrictions. Claimant did, in fact, continue performing his regular job at the same rate of pay and sought no further medical treatment. He was, however, laid off on January 1, 1995.

Respondent argues that the award should be limited to functional impairment only and attempts to distinguish the facts of this case from Lee v. Boeing Co. - Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995). In the Lee case, the Court of Appeals approved an Appeals Board decision which changed the award from functional to work disability as of the date of layoff. Respondent points out that in the Lee case the employee was working in an accommodated position prior to the layoff. In the present case, on the other hand, the claimant continued to perform his regular duties. Respondent argues that this factual distinction requires a different result here.

The Appeals Board disagrees. In our opinion the justification for converting to work disability at the point of layoff comes from the fact that the layoff is outside of the claimant's control. When measuring loss of ability to work and earn wages, the statute requires that there be a presumption that there has been no loss when the claimant is, in fact, earning the same wages as prior to the injury. K.S.A. 44-510e. When claimant's layoff occurred, the presumption no longer applied, regardless of whether the period of return to work was in an accommodated or a regular position. The question then becomes how the injury and work

restrictions are likely to affect claimant's ability to earn wages and retain employment in the open labor market.

The Appeals Board does agree, however, with respondent's contention that the ALJ's findings relating to work disability should be modified. First, as respondent argues, claimant should be limited to functional impairment during the period he was, in fact, working and earning a comparable wage, i.e. through January 1, 1995. Dr. Robert Eyster and Dr. Ernest Schlachter both gave opinions regarding claimant's impairment of function. As indicated above, Dr. Eyster concludes claimant suffered a 12 percent impairment of function. Dr. Schlachter, on the other hand, concluded that claimant suffered a 20 percent permanent partial impairment of the body as a whole. By giving equal weight to both opinions, the Administrative Law Judge found the claimant had 16 percent permanent partial impairment. Although the Appeals Board has, for reasons stated below, found the restrictions recommended by Dr. Eyster to be more persuasive, the Appeals Board, nevertheless, agrees with the decision to give equal weight to these two impairment of function ratings. Claimant's injury, which involved two levels with some residual neuropathy secondary to postoperative scar tissue, warrants the finding that claimant suffered a 16 percent permanent partial impairment to the body as a whole.

Both Dr. Eyster and Dr. Schlachter recommended restrictions. Dr. Eyster's restrictions are described above. Dr. Schlachter recommended slightly more restrictive work limitations. By a letter report dated February 14, 1995, Dr. Schlachter recommended claimant not engage in work which involved repetitive lifting of more than 35 pounds or single lifts of more than 40 pounds. He also recommended claimant not engage in repetitive bending, twisting or working in awkward positions and that he have a job where he can sit part time and stand part time.

Two vocational consultants testified and gave opinions regarding claimant's loss of ability to perform work in the open labor market and to earn comparable wages. Both gave separate opinions based upon Dr. Eyster's and Dr. Schlachter's restrictions. The Appeals Board has chosen to rely on the somewhat less restrictive recommendations by Dr. Eyster because claimant's returning to work for respondent for over ten months demonstrates his continued ability to do a variety of physically demanding work after his injury and surgery. When claimant returned to work he engaged in loading and unloading of baggage from airplanes approximately four hours per day, lifting weights from 1 to 100 pounds. Although there is some indication that his seniority allowed him to rely on other crew members, there is no indication in the record that he had any difficulty performing these physically demanding job responsibilities. The work appears, in fact, to involve some activities which exceed the restrictions recommended by Dr. Eyster. Given the nature of injury and relying upon Dr. Eyster's opinions which are based upon his examination of claimant over a period of time, the Appeals Board has chosen to weigh only those opinions of the vocational experts which rely on Dr. Eyster's restrictions.

In this case Karen Terrill testified that based upon Dr. Eyster's restrictions of February 1994, claimant has a 12 percent loss of ability to perform work in the open labor market. Mr. Jerry Hardin concluded that, based upon Dr. Eyster's restrictions, claimant has a 25 to 30 percent loss of ability to perform work in the open labor market. Giving equal weight to both opinions, the Appeals Board finds claimant suffered a 20 percent loss of ability to perform work in the open labor market.

The Administrative Law Judge found claimant had a 100 percent loss of ability to earn comparable wages. He did so on the basis of the fact that claimant was not working at the

time that the evidence was submitted in this case. The Appeals Board does not agree that this accurately measures claimant's loss of ability based upon the injury sustained. Both vocational experts gave opinions regarding claimant's loss of ability to earn comparable wages. Ms. Terrill testified that, based upon Dr. Eyster's restrictions, claimant could still perform unskilled base work such as assembly which pays \$7.00 to \$8.00 per hour. This would show a loss of ability to earn comparable wages of 54 percent. Mr. Hardin, on the other hand, found, using Dr. Eyster's restrictions, a 49 percent loss of ability to earn comparable wages assuming a preinjury wage of \$625.23. Giving equal weight to the opinions of both experts, the Appeals Board finds claimant has a 51 percent loss of ability to earn a comparable wage.

By giving equal weight to the loss of ability to earn a comparable wage and loss of ability to obtain and retain employment in the open labor market, the Appeals Board finds the claimant has a 35.5 percent permanent partial general disability.

### **AWARD**

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Clifford L. Kirkpatrick, and against the respondent, TWA, and its insurance carrier, Travelers Indemnity, and the Kansas Workers Compensation Fund, for an accidental injury which occurred April 2, 1993 and based upon an average weekly wage of \$625.27, for 37 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$11,063.00, followed by 54.29 weeks at the rate of \$66.70 per week or \$3,621.14 for a 16% permanent partial general body impairment of function through January 1, 1995, followed by 323.71 weeks at the rate of \$147.99 per week for a 35.5% permanent partial impairment of \$47,905.84 for a total award of \$62,589.98.

As of February 29, 1996, there is due and owing claimant 37 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$11,063.00, followed by 54.29 weeks of permanent partial disability compensation at the rate of \$66.70 per week and 60.71 weeks at \$147.99 per week, for a total of \$23,668.61 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$38,921.37 is to be paid for 263 weeks at the rate of \$147.99 per week, until fully paid or further order of the Director.

Fees are hereby assessed as stated in the Award of September 26, 1995.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Zongker, Wichita, KS  
William L. Townsley III, Wichita, KS  
Edward D. Heath, Jr., Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director